United Nations A/CN.9/SR.904

General Assembly

Distr.: General
29 July 2010

Original: English

United Nations Commission on International Trade Law

Forty-third session

Summary record of the 904th meeting

Held at Headquarters, New York, on Tuesday, 22 June 2010, at 3 p.m.

Chairperson: Mr. Schneider (Chairperson of the Committee of the Whole) ..... (Switzerland)

Contents

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules (*continued*)

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within one week of the date of this document* to the Chief, Official Records Editing Section, room DC2-750, 2 United Nations Plaza.

Any corrections to the record of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

10-41663 (E)

Please recycle

The meeting was called to order at 3.20 p.m.

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules (*continued*)
(A/CN.9/703 and Add.1, A/CN.9/704 and Add.1-10)

Draft revised UNCITRAL Arbitration Rules

Section IV. The award (*continued*)

Draft article 41. Fees and expenses of arbitrators

1. **The Chairperson** invited the Committee to resume its consideration of draft article 41.

2. **Mr. Bellenger** (France) said that, although his delegation had no problem with the substance of draft article 41, it was too long and repetitious and its style ponderous. For example, the first sentence of draft article 41, paragraph 2, could be shortened by deleting the words "has been agreed upon by the parties or designated by the Secretary-General of the PCA, and if that authority". The manner in which the appointing party was designated was set out clearly in another part of the Arbitration Rules.

3. Draft article 13, paragraph 4, should be deleted because it was, in essence, a repetition of draft article 41, paragraph 4. Alternatively, the Committee could choose to retain draft article 41, paragraph 4, and shorten draft article 13, paragraph 4.

4. **The Chairperson** recalled that in its comments on the revised Arbitration Rules (A/CN.9/704/Add.5), the Comité Français de l'Arbitrage had also proposed simplifying draft article 41, paragraph 4.

5. With regard to draft article 41, paragraph 2, he said the representative of France had proposed that the beginning of the paragraph should be amended to read: "If the appointing authority applies or has stated that it will apply ...". He took it that the Committee wished to approve the proposed wording.

6. *It was so decided.*

7. **The Chairperson** said he understood that the delegation of France wished to propose an amendment to draft article 41, paragraph 4.

8. **Mr. Bellenger** (France) said that, instead of amending draft article 41, paragraph 4, his delegation would prefer to delete the last sentence of draft article 6, paragraph 4, which provided that the parties might request the Secretary-General of the Permanent Court of Arbitration (PCA) to make a decision on the fees and expenses of arbitrators under draft article 41, paragraph 4. That course of action was preferable because draft article 6 set out the general terms for designating and appointing authorities while draft article 41 was specifically concerned with arbitrators' fees and expenses.

9. **Mr. Boulet** (Observer for Belgium) said that his delegation supported the proposal that had been made by the representative of France. All issues related to arbitrators' fees and expenses should be addressed in draft article 41. He therefore proposed that the bracketed words in article 41, paragraph 4, should be deleted and that the paragraph's second sentence should read: "Within 15 days of receiving the arbitral tribunal's determination of fees and expenses, any party may refer for review such determination to the appointing authority, or if no appointing authority has been agreed upon or designated or if the appointing authority refuses or fails to make any decision, to the Secretary-General of the PCA".

10. **Mr. Chung** Chang-ho (Republic of Korea) said that his delegation was reluctant to delete draft article 6, paragraph 4, because it offered the parties two possible courses of action should the appointing authority fail to act. The paragraph's first sentence provided for the designation of a substitute appointing authority, thereby addressing situations that might arise in relation to draft articles 8 to 14 and draft article 41, paragraph 3, while the paragraph's second sentence was concerned solely with situations that might arise in relation to draft article 41, paragraph 4.

11. Removing the second sentence of draft article 6, paragraph 4, would create confusion as to which option could be applied in situations where the appointing authority refused or failed to act in accordance with the Arbitration Rules. It would therefore be preferable to retain draft article 6, paragraph 4, in its present form.

12. **The Chairperson** said that the Working Group had decided to group all provisions concerning the appointing authority under draft article 6. In discussing draft article 41, it had further decided that an additional provision in that regard could be introduced into the second sentence of draft article 41, paragraph 4. Since the circumstances addressed by the additional provision could occur only under draft article 41, paragraph 4, the observer for Belgium had proposed that those circumstances should be regulated in draft article 41.

13. **Mr. Chung** Chang-ho (Republic of Korea) said deleting the second sentence of draft article 6, paragraph 4, might create the impression that the parties could request the PCA to designate a substitute appointing authority. Should the Committee choose to delete the second sentence, it might wish to include a proviso that addressed situations that could arise under draft article 41, paragraph 4.

14. **Mr. Castello** (United States of America) said that he supported the position of the representative of the Republic of Korea. In fact, removing the second sentence of article 6, paragraph 4, would be misleading because it created a general rule whereby the parties could request the designation of a substitute appointing authority if the appointing authority refused to act within any time period specified in the Arbitration Rules. It would be best to leave draft article 6, paragraph 4, intact and introduce cross-references into both paragraphs to guide the reader.

15. **Mr. Petrochilos** (Greece) said that the most logical place for the entire provision was draft article 41, paragraph 4, as had been proposed by the observer for Belgium. The United States proposal would effectively split the provision across draft article 6, paragraph 4, and draft article 41, paragraph 4. The treatment of the same exception in two different articles was not sound legislative technique and would confuse any reader who had not participated in the drafting of the Arbitration Rules. The best approach would be to introduce language into draft article 6, paragraph 4, notifying the reader that draft article 41, paragraph 4, contained an exception.

16. **The Chairperson** said it was his understanding that the choice before the Committee was either to introduce the exception in draft article 41, paragraph 4, and clarify that it was an exception to draft article 6, paragraph 4, or vice versa.

17. **Mr. Petrochilos** (Greece) pointed out that draft article 6, paragraph 4, was intended to address a situation in which the appointing authority failed or refused to act, whereas draft article 41, paragraph 4, was intended to address a situation in which the appointing authority had not been designated or agreed or had failed or refused to act. Since draft article 6, paragraph 4, did not address all of the circumstances in which parties might wish to turn to the Secretary-General of the PCA, it was more logical to group all of the exceptions under draft article 41, paragraph 4.

18. **Mr. Bellenger** (France) said it was his understanding that disputes concerning fees and expenses that arose at such a late stage in the arbitral process could be addressed through only two specific remedies: the designation of a substitute appointing authority or direct referral of the dispute to the Secretary-General of the PCA. That was why his delegation had proposed that the entire issue should be addressed under draft article 41. However, if the Committee agreed with the observations of the representative of the Republic of Korea, then his delegation's proposal was no longer valid.

19. **The Chairperson** said that, in situations where an appointing authority had not been designated or had refused to act, the key question was whether the Committee wished to preserve the right of the parties to request the designation of a substitute appointing authority or whether the parties should be given the sole option of turning to the Secretary-General of the PCA.

20. **Mr. Boulet** (Observer for Belgium) said that, even if the second sentence of draft article 6, paragraph 4, was deleted, it was unwise to completely remove from article 6 all references to draft article 41. The reason was that all steps connected with designating an appointing authority were more logically taken at an early stage in the arbitration process, and were thus dealt with at an early point in the Rules. The representatives of the Republic of Korea and Greece had rightly pointed out the difficulty in readability and comprehension that would arise if article 6, paragraph 4, and article 41, paragraph 4, were not clearly connected. One way to achieve that linkage would be to add to the first sentence of article 6, paragraph 4, the phrase "Subject to the provisions of article 14, paragraph 4", or other words to the same effect.

21. **The Chairperson** said that a consensus appeared to have formed around the proposal of the representative of Belgium to delete both the second sentence of draft article 6 and the reference to article 6 contained in square brackets in draft article 41, paragraph 4. Appropriate drafting changes would be necessary.

22. **Mr. Friedman** (Observer for the International Bar Association) said that the Rules should ideally be simple to follow, but that was not the case with paragraph 4 of draft article 41 in its current form. He suggested that the reference in the first sentence to

article 40, paragraphs 2 (a) and (b), should be deleted. In addition, the third sentence of the paragraph should be amended to begin as follows: "If, and to the extent that, the appointing authority finds that the arbitral tribunal's determination of fees and expenses is inconsistent with the fee proposal, or is otherwise manifestly excessive, the appointing authority or the Secretary-General of the PCA shall, within 45 days of receiving such a referral, make any necessary adjustments ...". In order to take account of the discussion just concluded, it could be specified that, if no appointing authority had been designated or if the appointing authority refused to act, the determination should be made by the Secretary-General of the PCA.

23. **Ms. Smyth** (Australia) said that she supported the suggested changes.

24. **Mr. Castello** (United States of America) said that, while he agreed with the basis for the suggestions of the observer for the International Bar Association, paragraph 4 of draft article 41 was the product of long discussion. The Committee should take the time needed to examine carefully any proposed amendments, which should be presented in writing rather than orally.

25. Since the last meeting of Working Group II in February 2010, his delegation had continued to ponder the usefulness of draft article 41, paragraph 4, not on the basis of opposition to regulating levels of fees and expenses, but because the mechanism proposed was trying to apply a remedy of uncertain effectiveness and risk to a problem of unknown extent. So far, only anecdotal evidence of excessive or unreasonable fees existed. He wondered how often an appointing authority would detect and correct improper levels of fees, whether it might not seek to revise fees for an unrelated reason and whether there was a risk that disgruntled losing parties in an arbitration might challenge the fees charged because such action guaranteed a delay in the enforcement of the arbitral award of a total of up to 60 days, as detailed in draft article 41, paragraph 3.

26. Moreover, an appointing authority requested to review fees and expenses was likely to charge for that service, for which it would also require evidence, including arbitrators' invoices. It should be remembered that, as the review would be taking place at the beginning of the arbitral process, the appointing authority was also likely to demand a deposit representing part of the cost of its review from the party requesting the review. However, such a deposit might in fact help to deter frivolous review requests.

27. **Mr. Snijders** (Observer for the Netherlands) said, as a related consideration, that draft article 41, paragraph 3, appeared not to address the possibility of there being no appointing authority, or of the appointing authority refusing to act. Perhaps language providing for a request to the PCA Secretary-General to designate a substitute appointing authority should be added.

28. **The Chairperson** said he recalled that the omission from draft article 41, paragraph 3, of the possibility of requesting the PCA Secretary-General to designate a substitute appointing authority had been deliberate. Draft article 6 established the general principle that, if a problem arose with the appointing authority, the parties must turn to the PCA. However, it had been decided not to prescribe the launching of such a time-consuming process at the late stage of the arbitration procedure described in draft article 41, paragraph 2. That paragraph therefore provided that the power of designation should be given directly to the PCA Secretary-General. In contrast, paragraph 3 of that same article described an early stage in the arbitration process, just after the constitution of the arbitral tribunal, during which the general principle could still apply.

29. **Mr. Daly** (Observer for the Permanent Court of Arbitration) expressed concern that the amendments to article 41, paragraph 2, proposed by the representatives of Greece and France might cause confusion by implying that there must always be an appointing authority. In fact, many arbitration cases proceeded without such an authority. The involvement of an appointing authority in determining a schedule or method of determining arbitrators' fees, as described in paragraph 2, occurred only if such an authority had been agreed upon or had been designated by the PCA Secretary-General.

30. **The Chairperson** said that the wording of paragraph 2 should be examined from the standpoint of clarity for arbitration users and practitioners. In the current case, the test was whether those individuals could easily infer from that paragraph that if no appointing authority had been agreed upon or designated, the arbitral tribunal would simply have no

schedule or method of determining fees to use as a point of reference.

31. **Mr. Castello** (United States of America) said that confusion might be avoided by amending the beginning of paragraph 2 to read: "If there is an appointing authority, and it applies or has stated that it will apply a schedule ...".

32. **Mr. Möller** (Observer for Finland) said that he shared the concerns of the representative of the United States regarding the mechanism for regulating arbitrators' fees and expenses.

33. **Mr. Petrochilos** (Greece) said that he agreed in principle with the view of the United States representative regarding a deposit against the cost of a review. As draft article 4 currently made no such provision, he would like to see the specific language proposed. On the general issue addressed in paragraph 4, while the scope of the problem was unclear, nevertheless something had to be done about the kind of very grave instances of rogue decisions by arbitral tribunals that were known to have taken place — even though they had been described as "anecdotal" — and that could only lead the parties to lose confidence in the arbitration process. There were two options for redress in such cases: to apply to the courts — and the difficulty of finding both the appropriate jurisdiction and the legal basis for doing so was well known; or to resolve the matter in an ad hoc manner in the pro-arbitration fashion set out in paragraph 4.

34. Regarding the risk of abuse, paragraph 6 had been inserted to make it clear that the challenge did not affect any determination by the tribunal other than the costs at issue. The cost deterrent referred to by the United States would also help prevent abuse. Paragraph 4 should be seen as part of a mechanism that started in paragraphs 2 and 3, which allowed the parties to know in advance what the tribunal was proposing with regard to fees and expenses. Paragraph 4 served as a last check-and-balance. After four years of discussion, the Working Group had decided that unless the Commission was ready either to give the arbitrators free rein or to subject them to problematic court proceedings, paragraph 4 was the best compromise.

35. **The Chairperson** asked the United States to draft wording for his proposal regarding a deposit, for subsequent consideration.

36. He drew attention to a written proposal by the Netherlands (in document A/CN.9/704/Add.2, p. 5) that at the end of paragraph 4, the words "pursuant to article 38" should be deleted and replaced by a new final sentence, "Article 38, paragraph 3, shall apply."; the reasoning was that not all provisions of article 38 applied, and that those that did applied only by analogy.

37. **Mr. Castello** (United States of America) recalled that after much discussion, the Working Group had been unsure of the effect of the application of article 38 on an action that was going to be taken by the arbitral tribunal. Perhaps paragraph 4 could be amended to read, "The procedure of article 38, paragraph 3, shall apply.".

38. *It was so decided.*

39. *Draft article 41, as amended, was adopted, subject to agreed redrafting.*

The meeting was suspended at 4.40 p.m. and resumed at 5.10 p.m.

Section I. Introductory rules (*continued*)

Draft article 6. Designating and appointing authorities (*continued*)

40. **Mr. Castello** (United States of America) recalled that he had been asked to draft wording for a point raised by the Observer for the Association of the Bar of the City of New York, which was not covered in draft article 6, paragraph 4, namely, the failure of an appointing authority to act in response to a challenge. In the first sentence of paragraph 4, he proposed deleting the word "or" before the words "fails to act", and inserting the following clause after the phrase "by these Rules,": "or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party's request to do so,".

41. Nowhere in the Rules or draft articles was there a time limit for an appointing authority to resolve a challenge, and he had not proposed that one should be established in paragraph 4 — even though that had been done earlier in the paragraph in the case of the appointment of arbitrators — because it was hard to predict how long the process would take. The solution had seemed to be to set a "reasonable" time. Although he had originally intended to formulate a general clause encompassing the three possibilities described

in paragraph 4, it had been too hard to craft one and he had settled on an enumeration. The paragraph covered an activity for which there was no time limit elsewhere in the Rules but which was made subject to one now — the appointment of an arbitrator, together with other activities by the appointing authority which were subject to time limits elsewhere in the Rules and the question of the challenge, which for good reason was nowhere subject to time limits.

42. **Mr. Moollan** (Mauritius) said that there was another possible approach. The various time periods now specified in article 6, paragraph 4, could be specified instead in the articles where they applied: for example, in the case of the appointment of arbitrators, articles 8 and 10, and in the case of the challenge, article 13, paragraph 4. That would have the advantage of alerting the appointing authority to the deadline in the relevant Rule itself. The language of article 6, paragraph 4, could then be simplified to read: "If the appointing authority refuses to act or fails to act within a period provided by the Rules, etc.".

43. **The Chairperson** asked Mauritius to devise wording for the articles affected by his proposal, for subsequent consideration. The other point left pending in draft article 6 was the wording for the exception that it had been decided would replace the second sentence of paragraph 4.

Section III. Arbitral proceedings (*continued*)

Draft article 17. General provisions (*continued*)

44. **Mr. Moure** (Observer for the International Bar Association) said that, in the first sentence of draft article 17, paragraph 1, the decision to replace the words "full opportunity" by the words "an opportunity" gave perhaps too much latitude to the arbitral tribunal in allowing a party to present its case. He suggested instead the words "a reasonable opportunity".

45. **Mr. Möller** (Observer for Finland) said that another possibility was an "adequate" opportunity.

46. **Mr. Chung** Chang-ho (Republic of Korea) said that if qualifying the word "opportunity" in draft article 17 entailed qualifying its every appearance throughout the Rules, he would favour keeping the text as it stood.

47. **Mr. Boulet** (Observer for Belgium) suggested that, in the French text, rather than "une possibilité" (an opportunity), it would be preferable to say "la possibilité" (the opportunity).

48. **Mr. Moollan** (Mauritius) cited the 1996 English Arbitration Act, which allowed the parties "a reasonable opportunity". He said that the addition of the qualifier "reasonable" in draft article 17, paragraph 1, would not need to be repeated for each occurrence of the word "opportunity" throughout the draft text.

49. **The Chairperson** said that the replacement of "an opportunity" by "the opportunity" did not appear to resolve the matter.

50. **Ms. Matias** (Israel) expressed agreement with the point made by the delegation of the Republic of Korea. Each and every opportunity provided for by the draft Rules should be reasonable.

51. **Mr. Snijders** (Observer for the Netherlands) said that article 15 of the Rules of Arbitration of the International Chamber of Commerce allowed each party a reasonable opportunity to present its case. It would not be strange to specify that the opportunity should be reasonable in the present case since that was a fundamental principle for equality of the parties.

52. **Mr. Bellenger** (France) said that, in the French text, the qualification of "une possibilité" (an opportunity) by the word "raisonnable" (reasonable) amounted to a reduction of the opportunity thus provided for. He recalled that the 1976 Rules had given the parties "toute possibilité" (a full opportunity) of presenting their case; that opportunity must be guaranteed.

53. **The Chairperson** noted that none of the other opportunities provided for in the draft text was for the purpose of presenting a party's case. The addition of the word "reasonable" could therefore be justified in draft article 17 without its having to be repeated elsewhere.

54. **Mr. Schöll** (Observer for Switzerland) said that the main concern should be to ensure that the parties had an equal opportunity to exercise their right to be heard.

55. **Mr. Anaya** (El Salvador) expressed support for the addition of the word "reasonable" in paragraph 1 on the ground that it was a general provision.

56. **Mr. Chung** Chang-ho (Republic of Korea) concurred with the delegation of France that the

opportunity for a party to present its case should be fully protected.

57. **Mr. Moollan** (Mauritius) suggested the reinstatement of the 1976 wording "a full opportunity" or, alternatively, the introduction of the qualification "adequate" before the word "opportunity".

58. **The Chairperson** said the intention of the Working Group in removing the word "full" had been to avoid excessive pleadings. Responding to the point made by the delegation of France, he acknowledged that a reasonable opportunity was one that was not unlimited.

59. **Ms. Matias** (Israel) said that, if the concern was indeed to limit the opportunity offered, the insertion of the word "reasonable" appeared justified.

60. **Mr. Castello** (United States of America) said that, by changing "full" to "reasonable", the Working Group would have reduced the opportunity for challenge excessively. It was indeed preferable not to qualify the opportunity so as to ensure adequate but not unlimited opportunity for challenge.

61. **The Chairperson** noted that, in the Arbitration Rules of the International Chamber of Commerce, where the English text allowed each party "a reasonable opportunity to present its case", the French version provided that each party should have "la possibilité d'être suffisament entendu" (the opportunity of a sufficient hearing).

62. **Mr. Rovine** (Observer for the Association of the Bar of the City of New York) said that the Committee should be guided by the practice of others. A persuasive argument in favour of the formula "a reasonable opportunity" was that other bodies had found it to be the most workable.

63. **Mr. Bellenger** (France) proposed the word "adéquat" rather than "raisonnable" in the French version. The draft text set out a principle, not a rule of procedure; its object was to give full latitude to the arbitral tribunal to decide on procedure within limits imposed by equality of the parties and respect for their rights.

64. **The Chairperson** said that there appeared to be a consensus in support of the insertion of "reasonable" before the word "opportunity" in paragraph 1 of draft article 17.

65. Turning to paragraph 5 of the draft article, he said that, in the event of a request being made to join a third party in the arbitration, that party would be protected through the refusal of such a joinder where it would be considered prejudicial to the interests of any party.

66. **Ms. Hu** Shengtao (China) said that prejudice to any of the parties to an arbitration agreement should not be a ground for not allowing the joinder of a third person, as the arbitral tribunal had no right to prohibit such joinder: as a party to the arbitration agreement, a third party could be a claimant, just as that party could not be refused the right to act as a respondent. Moreover, in accordance with draft article 10, a third party joined should be able to appoint or reappoint an arbitrator in the same way as other parties to the arbitration agreement.

The meeting rose at 6.10 p.m.